IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 23 OF 2004

Shri Ramdas Anant Naik,
major in age, businessman,
resident of House No.210,
Orlim, Salcete, Goa. ... Appellant

versus

1. Shri Jacob Fernandes,
major in age, businessman,
resident of House No.484,
Antoi Ward, Guirdolim,
Salcete, Goa.

2. State ... Respondents

Mr. Arun Bras de Sa, Advocate for the Appellant.

Mr. V. B. Nadkarni, Senior Advocate with Mr. Y. V. Nadkarni, Advocate for Respondent No.1.

CORAM : V. M. KANADE, J.

DATE : 4TH AUGUST,2005.

ORAL JUDGMENT

The Appellant is the Original Complainant. He is challenging the Judgment and Order passed by the Judicial Magistrate, First Class at

Margao in Criminal Case No. 335/N/97/D. By the said Judgment and Order dated 11th Feberuary, 2004, the trial Court was pleased to acquit the Accused for an offence punishable under Section 138 of the Negotiable Instruments Act, 1881(Act, for short).

2. The brief facts which are relevant for the purpose of deciding this Criminal Appeal are as under:-

The Appellant filed a complaint against Respondent No.1 under Section 138 of the said Act in the Court of the Judicial Magistrate, First Class at Margao. It was alleged in the complaint that the Accused had taken a friendly loan to the tune of Rs.7,50,000/- from the Complainant and had promised to pay the same with interest at the rate of 22% per annum. It was alleged in the complaint that the Complainant had borrowed part of amount from his friends and well-wishers and had given it to the Accused. It was further alleged that the Accused handed over to the Complainant a cheque for an amount of Rs.7,50,000/- dated 2-6-1997 which was drawn on Canara Bank, Chandor. However, on presentation of the said cheque it was returned dishonoured to the Complainant through his Bankers on the ground of "Insufficient funds". Thereafter, a complaint was filed when the Accused did not pay the amount within 15 days from the receipt of the statutory notice which was sent by the Complainant.

3. I have heard the learned Counsel appearing on behalf of the Appellant and the learned Counsel appearing on behalf of the Respondent No.1. The learned Counsel appearing on behalf of the Appellant has taken me through the Judgment of the trial Court as also the evidence adduced by the Complainant and the Respondent. He submitted that the trial Court had erred in coming to a conclusion that there was no subsisting debt or liability inter se between the parties. He submitted that the trial Court had clearly erred in coming to a conclusion that the presumption which was raised under Section 139 of the said Act was rebutted by the Accused. He further submitted that the Accused had kept on changing his defence from time to time and this fact was borne out by the evidence which had come on record. He submitted that, therefore, the Accused by raising these inconsistent pleas had not discharged the burden which was cast on him under Section 139 of the said Act. He submitted that at one stage the Accused had taken a defence that the cheque was issued by him as a Director of the Company and on the other hand he had taken a defence that he did not owe any money to the Appellant and that the Company namely M/s. Waves Shipping Pvt. Ltd. owed the money to the Complainant. He further submitted that the Accused at the same time had raised a defence that the cheque in question was given in lieu of the transaction of sale of property and the said transaction not having materialised there was no question of payment of the said amount. The learned Counsel appearing on

behalf of the Appellant submitted that the trial Court has erred in not appreciating the fact that the 2 transactions were separate and distinct and did not overlap one and another. The learned Counsel further tried to point out from the cross-examination and the admission given by the Accused that none of the defence which he had raised however was correct. He, therefore, submitted that the finding recorded by the trial Court was liable to be set aside and the Accused was liable to be convicted for the offence punishable under Section 138 of the said Act. He submitted that the finding given by the trial Court that the cheques which were issued by the Accused were blank cheques and was not based on proper evidence of the Accused.

4. The learned Senior Counsel appearing on behalf of Respondent No.1 initially invited my attention to the Judgment of the Supreme Court in the case of **Totasingh and another** v. **State of Punjab** (AIR 1987 SC 1083). He has also relied on a Judgment of the Supreme Court in the case of **C. Antony** v. **K. G. Raghavan** (AIR 2003 SC 182). He submitted that the Supreme Court has in the said Judgments considered the scope of interference by the High Court in an appeal against acquittal. He submitted that in cases where two views are possible on an appraisal of the evidence adduced in the case and the trial Court had taken a view which was a

plausible view the appellate Court cannot legally interfere with the Order of acquittal even if it is of the opinion that the view taken by the Court below is erroneous. He thereafter submitted that the trial Court had given a specific finding that the cheque issued by the Accused was a blank cheque and, therefore, no criminal liability was attracted if a blank cheque is given. In support of the said submission he relied on a Judgment in the case of **M/s. Kusum Ingots & Alloys Ltd.** v. **M/s. Pennar Peterson Securities Ltd. and others**(AIR 2000 SC 954). He also relied on a Judgment of the Supreme Court in the case of **Ashok Yeshwant Badeve** v. **Surendra Madhav Rao Nighojakar**(AIR 2001 SC 1315). He also relied on a Judgment of the Andhra Pradesh High Court in the case of **Avon Organics, Hyd. Ltd.** v. **Poineer Products Ltd. and others** (2003 ALL MR(Cri.) JOURNAL 105). He further submitted that the Complainant had produced a xerox copy of the cheque and the original was returned by the Court. He submitted that even if a xerox copy of the cheque is considered it could be seen that the cheque was filled in subsequently as the handwriting of the person who signed the cheque was the handwriting of the person who filled in the details of the said cheque and were of different persons. He invited my attention to the evidence of the Complainant and pointed out that according to the Complainant the amount was given by him in 1995 and the Accused had given a cheque of Rs.7,50,000/- on 2-6-1997. He further invited my attention to the statement made by the Complainant that no

amount was given by him to the Accused after 1995. He submitted that if this position was true the entire amount which was outstanding from the Accused was Rs.4,70,000/- which was paid by cheque dated 11-3-1996 which was evident from the notice which was given by the Complainant. He submitted that if this position was true then there was no question of issuing another cheque of an amount of Rs.7,50,000/- on 2-6-1997. He submitted that, therefore, the Accused had succeeded in bringing on record that blank cheques were given and it was immaterial whether the said cheques were 3 or 4 in number. He further invited my attention to the agreement of understanding which was executed between the parties. He invited my attention to Clause 5 of the said agreement where it was categorically stated that in the event the transaction of sale of property did not materialise the amounts mentioned in the said agreement would not become stable. He further submitted that there was no averment in the complaint regarding the date of advancing of loan and, therefore, on this ground also the complaint was liable to be dismissed as there was no foundation in the complaint regarding the existence of a legally enforceable liability. He invited my attention to a Judgment of the Supreme Court in the case of **Keshoram Industries and Cotton Mills Ltd.** v. **The Commissioner of Wealth TAX(Central), Calcutta** (AIR 1966 SC 1370). He invited my attention to the observatrion made in the Supreme Court in respect of the meaning of the word "debt". He submitted that since in the present case the

sale transaction had not taken place the amount by way of commission had not become due and payable and, therefore, the blank cheque which was given did not attract the penal provision under Section 138 of the said Act. The learned Counsel appearing on behalf of the Appellant in rejoinder relied on a Judgment of the Supreme Court reported in ((2001) 6 SCC 16) and also in the case reported in ((2002) 1 SCC 234). He submitted that, merely because there was no averment in the complaint it cannot be said that the said complaint was liable to be dismissed on that count. He further invited my attention to the various discrepancies in the answers which were given by the defence witness and submitted that the Accused was in the habit of taking money. He submitted that the trial Court ought to have drawn adverse inference against the Accused for failing to examine Ramdas Kholkar and Sadanand Naik as the whole defence involved the said two persons. He submitted that the Magistrate ought to have held that the defence of the Accused was an afterthought and as such the Accused had not rebutted the presumption by tangible, probable and overwhelming evidence. He submitted that since the findings given by the trial Court was unreasonable and perverse this was a fit case where the finding was liable to be set aside and the Accused was liable to be convicted under the provision of Section 138 of the said Act.

5. **Findings and Conclusion:-**

Before I consider the rival contentions raised by the Appellant and the Respondents it will be necessary to examine the scope of the appreciation of evidence by the High Court under Section 378 of the Code of Criminal Procedure(Code, for short). Though, there are a number of Judgments at ths point the Supreme Court in the case of **Tota Singh and another** v. **State of Punjab** (supra) has very succintly laid down the text and guidelines for interfering with the Order of the trial Court. The Supreme Court in para 6 has observed as under:-

> "The High Court has not found its judgment that the reasons given by the learned Sessions Judge for discarding the testimony of P.W.2 and P.W.6 were either unreasonable or perverse. What the High Court has done is to make an independent reappraisal of the evidence on its own and to set aside the acquittal merely on the ground that as a result of such reappreciation, the High Court was inclined to reach a conclusion different from the one recorded by the learned Sessions Judge. This Court has repeatedly pointed out that the mere fact that the Appellate Court is inclined on a reappreciation of the evidence to reach a conclusion which is at variance with the one recorded in the order of acquittal passed by the Court below will not constitute a

> valid and sufficient ground for setting aside the acquittal. The jurisdiction of the Appellate Court in dealing with an appeal against an order of acquittal is circumscribed by the limitation that no interference is to be made with the order of acquittal unless the approach made by the lower Court to the consideration of the evidence in the case is vitiated by some manifest illegality or the conclusion recorded by the Court below is such which could not have been possibly arrived at by any Court acting reasonably and judiciously and is, therefore, liable to be characterised as perverse. Where two views are possible on an appraisal of the evidence adduced in the case and the Court below has taken a view which is a plausible one, the Appellate Court cannot legally interfere with an order of acquittal even it is of the opinion that the view taken by the Court below on its consideration of the evidence is erroneous".

6. The Supreme Court thereafter in the subsequent Judgment in the case of **C. Antony** v. **K. G. Raghavan Nair(supra)** has observed that though the appellate Court has full power to review the evidence upon which the order of acquittal is founded, still while exercising such an appellate power in a case of acquittal, the appellate Court is under an obligation to first come to a conclusion that the conclusions arrived at by the trial Court for good reasons are either unreasonable or contrary to the

material on record and in the absence of any such finding the High Court could not take a contra view merely because another view was possible on the material on record.

7. In the light of the observations made by the Supreme Court in the aforesaid cases and taking into consideration the settled position in law regarding the power of the High Court under Section 378 of the said Code it will have to be seen whether the finding recorded by the trial Court is either perverse or unreasonable.

8. In the present case, the Complainant had come out with a specific case that he had given a loan of Rs.7,50,000/- to the Accused and that he had promised to pay the sum with interest at the rate of 22% per annum. It would be relevant to note here at this stage that this averment is made in para 3 of the complaint and no date has been mentioned when the said amount was paid by the Complainant to the Accused. The case of the Accused is that thereafter on 2-6-1997 the Accused gave a cheque to the Complainant for an amount of Rs.7,50,000/- which was dishonoured after it was presented in the Bank. The Complainant in his evidence has stated that he had given an amount of Rs.7,50,000/- to the Accused by 3 cheques and partly by cash. The first cheque was given in December, 1994 for Rs.35,000/-, the second cheque was given in January, 1995 for

Rs.1,25,000/- and the third cheque was given in February, 1995 for Rs.1,00,000/- and the balance amount by cash in the year 1995. In his deposition, he has stated that there was a settlement between him and the Accused and the Accused executed a letter of understanding dated 29-5-1999. In the cross-examination, he admitted that the Accused was introduced to him by one Menino Dias who informed him that the Accused was a stock broker. He further admitted that the said Menino Dias had informed him that the Accused had executed an agreement for purchase with one Smt. Juliana Fernandes and that the Accused intended to sell the said property. He further stated in his cross that the Accused had agreed to pay the commission which was to be shared by Ramdas Kholkar, Sadanand Naik and the Complainant at the rate of Rs.900/- per sq. meter. The copy of the agreement in respect of the commission agreed to be paid was also produced by him in the cross-examination. He further admitted that after 1995 there was no money transaction or business transaction between him and the Accused. A suggestion was put to him that the Accused had given 2 cheques to him and to this question the Complainant gave a reply that the Accused had given him 3 cheques. The suggestion made by the Accused that blank cheques were given was however not accepted and admitted by the Complainant. This witness however further admitted that so far as the transaction of sale of property is concerned, it did not materialise and that the Accused as a result did not owe him any money towards the said

transaction. The letter of understanding was also brought on record by the Accused in cross-examination. From the perusal of Clause 5 of the letter of understanding it can be seen that it was specifically mentioned that the said letter of understanding was valid only if the Deed had taken place and for some reason if the Deed was cancelled the entire agreement was to be treated as null and void. Further the agreement of sale of property between Menino Fernandes, Ramdas Kholkar and Sadanand Naik also clearly showed that this was an agreement for sale of property which was executed on tenth day of June, 1996 which admittedly did not materialise which fact has been admitted by the Accused. The Complainant has examined himself and has taken a specific plea that 3 blank cheques were given by him to the Complainant towards security of payment of commission amount after the agreement of sale of property was executed. He has also given the number of the 3 cheques which coincides with the cheque which was dishonoured. The Accused has also examined Sadanand Naik, P.W.2, who has supported his case. In view of the admission given by the Complainant in my view the presumption raised under Section 139 has been rebutted by the Accused. From the evidence on record in my view it can be inferred that there were several transactions between the Complainant and the Accused and each had a claim against the other. The Accused has, therefore, rebutted the presumption raised under Section 139 and the Complainant has not been in a position to prove beyond reasonable doubt that the Accused was liable

under Section 138 of the said Act.

9. The trial Court on the basis of the evidence on record has given a finding that a blank cheque was issued to the Complainant after the evidence on record and has held that if a blank cheque is issued by any person and amount payable is not mentioned it does not constitute a cheque and, therefore, the penal provisions of Section 138 of the said Act are not attracted. The trial Court has relied on the Judgments of the Supreme Court in support of the said finding. In my view, the finding recorded by the trial Court cannot be said to be perverse. The Accused has changed his defence from time to time during the course of the trial. Yet once it is held that a blank cheque was given to the Complainant there is no reason to interfere with the said finding of fact recorded by the trial Court particularly when the trial Court has given cogent reasons while arriving at the said conclusion. The submission made by the learned Counsel appearing on behalf of the Appellant, therefore, cannot be accepted and the Judgment and Order passed by the trial Court is, therefore, confirmed. The Appeal is accordingly dismissed.

V. M. KANADE, J.

RD.